

STATE OF MICHIGAN
COURT OF APPEALS

REZA BAYATI,

Plaintiff-Appellant,

v

BAHAREH BAYATI, a/k/a BAHAREH BAHIR-
HOSSEINI BAYATI,

Defendant-Appellee.

UNPUBLISHED
November 8, 2005

No. 258378
Oakland Circuit Court
LC No. 2003-678242-DM

AFTER REMAND

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

This case is before us after remand. By way of review, following binding arbitration in this divorce matter, an award was rendered that granted the parties joint legal custody and defendant sole physical custody of the two minor children of the marriage, and allowed defendant to remove the children to California to live. The trial court adopted the arbitration award in total without independently considering what custodial placement was in the best interests of the children. Consequently, this Court vacated the custody order in its entirety and remanded the matter to the trial court for a de novo hearing. See *Bayati v Bayati*, 264 Mich App 595, 597; 691 NW2d 812 (2004). In a subsequent appeal, plaintiff complained that his parenting time schedule was modified without an evidentiary hearing. We agreed and vacated the modification order. Because the previously ordered evidentiary hearing was not conducted by the trial court, we ordered the court to conduct a hearing on both the custody and parenting time issues. *Bayati v Bayati*, unpublished per curiam opinion of the Court of Appeals, issued February 28, 2003 (Docket No. 258378).

After an extensive evidentiary hearing, on July 5, 2005, the trial court issued its written opinion and order. The court indicated that its first consideration was whether an established custodial environment existed. It determined that one existed with defendant primarily because she cared for the children in California from January 2004 through May 17, 2005. In light of this established custodial environment, the court noted that a change of custody could only be made upon a showing of clear and convincing evidence that the change was in the children's best interest. After considering each of the best interest factors, the court concluded that the children's best interest would be served by maintaining physical custody with defendant. Next the court considered the issue of parenting time. It held that, temporarily, there would be no change in parenting time but ordered defendant to furnish a school schedule so that a long term parenting plan could be created. Defendant was also ordered to comply with the court-ordered

web-cam communication twice per week and plaintiff was ordered to timely return the children consistent with the parenting time schedule.

After review of the court's opinion and order, we conclude that another remand is required. The reason this Court remanded the matter to the trial court the first time was because the trial court was operating under the misimpression that it could follow the recommendation of the arbitrator without reviewing and making an independent evaluation with regard to the custodial placement of the children. The custody order that was vacated by this Court granted defendant sole physical custody of the children and permitted them to reside in California. The custody order that was in effect just prior to this vacated custody order was a temporary custody order which provided that the parties shared joint legal custody of the children with defendant having physical custody in Michigan. Because this temporary custody order existed, the trial court was required to make a finding regarding the issue whether an established custodial environment existed. MCL 722.27(1)(c); see, also, *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

On remand, the court did consider the issue whether an established custodial environment existed, but with respect to the wrong time period. The court determined that an established custodial environment existed with defendant primarily because she cared for the children in California from January 2004 through May 17, 2005. However, the relevant time period to consider whether an established custodial environment existed was not *after* the divorce proceedings and the move to California but *before* the divorce was final and the children were moved to California. The circumstances surrounding the care of the children prior to the divorce, irrespective of the temporary custody order, are considered to determine whether they were being cared for in an established custodial environment. See *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995); *Schwiesow v Schwiesow*, 159 Mich App 548, 557; 406 NW2d 878 (1987). Further, on remand the trial court assumed without deciding that the change in domicile was proper. But, pursuant to MCL 722.31, just as the trial court was not allowed to rely solely on the arbitration award that granted physical custody to defendant, the trial court was not permitted to rely solely on the arbitration award with regard to the change in domicile decision.

MCL 722.31 provides:

- (1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.
- (2) A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4) permits the residence change.

* * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court **shall** consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

During the hearing on defendant's motion to change the domicile of the children, held on February 27, 2004, the court asked counsel whether the arbitrator awarded a change in domicile and the attorneys responded in the affirmative. Then the court held, "[t]he reason for my decision to grant this relief is that she [defendant] – the change of domicile in Michigan was already ordered by Mr. Sherbow [the arbitrator] and because she doesn't have a place to stay here." On February 27, 2004, an order was entered accordingly. It is clear that the court did not consider MCL 722.31 before allowing the change in domicile. It is also undisputed that plaintiff did not consent to defendant removing the children to California. See MCL 722.31(2). Although we held in a previous opinion that plaintiff agreed to arbitrate the change in domicile issue, *Bayati, supra* at 599, plaintiff did not consent to defendant removing the children to California and, in fact, has raised this dispute on several occasions. Therefore, the court was required to comply with MCL 722.31(4) before permitting the change in the children's domicile. See MCL 600.5080(2); see, also, *Harvey v Harvey*, 470 Mich 186, 194; 680 NW2d 835 (2004).

Because the court did not determine whether there was an established custodial environment in Michigan before it granted defendant sole physical custody and ordered that the children could be removed to California, without complying with MCL 722.31, we must remand the matter for consideration of these issues. The evidentiary hearing that was recently conducted appears to relate solely to matters subsequent to the children's change in domicile. Because there is no record to review that pertains to the issue whether an established custodial environment existed before the divorce proceedings and the move to California, or as to whether the change of domicile would be proper, it appears that another evidentiary hearing will be

required to permit the court to make these critical determinations. Accordingly, the trial court's custody order of July 5, 2005, is vacated and the matter is remanded for determinations of (1) whether an established custodial environment existed before the divorce proceedings and the move to California, (2) whether the change of domicile was proper, (3) the issue of physical custody, and (4) the issue of parenting time.

Reversed and remanded to the trial court for proceedings consistent with this opinion. We retain jurisdiction and instruct the trial court to conduct a hearing on these matters within 21 days of the issuance of this opinion, render its opinion on the issues within 7 days of the hearing, and forward its findings and a transcript of the hearing to this Court within 14 days of the entry of the trial court's opinion.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh

Griffin, J. did not participate

Court of Appeals, State of Michigan

ORDER

Reza Bayati v Bahareh Bayati

Docket No. 258378

LC No. 2003-678242-DM

Hilda R. Gage
Presiding Judge

Mark J. Cavanagh

Richard Allen Griffin*
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 21 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court is instructed to conduct a hearing on the matters within 21 days of the issuance of this opinion, render its opinion on the issues within 7 days of the hearing, and forward its findings and a transcript of the hearing to this Court within 14 days of the entry of the trial court's opinion.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

Griffin, J. did not participate.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

NOV 08 2005
Date

Sandra Schultz Mengel
Chief Clerk